VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 7th day of September, 1994.

Dexter Drake Coffin, III,
Appellant,

against

Record No. 2432-93-2
Circuit Court No. 6544

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Albemarle County
Before Chief Judge Moon, Retired Judges Hodges and Penn*

This petition for appeal is denied for the following reasons:

I. Appellant argues that the trial court erred by refusing to vacate its judgment of November 8, 1993 when it was informed of the Commonwealth's Attorney's conflict of interest.

Appellant was charged in 1985 with altering a prescription in violation of Code § 18.2-258.1. At the preliminary hearing, appellant elected to represent himself pro se, and the court asked Mr. Camblos to assist appellant in some capacity. The transcript does not reflect that Mr. Camblos argued before the court, questioned witnesses, or had any substantive relationship with appellant beyond explaining court procedure. On the contrary, the court made it clear that despite being assisted by Mr. Camblos, appellant was representing himself. Subsequently, appellant pled guilty to the charge, and was sentenced to three years in the state penitentiary, suspended upon the successful completion of five years

probation. Probation was to begin running after appellant's release from confinement for other convictions, which occurred on August 4, 1989.

In April, 1993, appellant pled guilty to two charges of subterfuge by receiving multiple prescriptions for painkillers from multiple physicians, in violation of Code § 18.2-258.1. These convictions were a violation of appellant's probation for the 1985 offense, and his probation officer sought a "show cause" hearing in Albemarle County. At the probation violation hearing, the Commonwealth was represented by Mr. Childress, an assistant prosecutor from the Albemarle County Commonwealth's Attorney's Office. By this time, however, Mr. Camblos, the attorney who assisted appellant in 1985, was now Albemarle County's Commonwealth's Attorney. Mr. Camblos and appellant greeted each other before court, and Mr. Camblos remained in the court during the hearing. At no time does the record reflect that Mr. Camblos in any way participated in the hearing, and appellant did not object to his presence.

The contemporaneous objection rule requires that an objection be stated at the time of the ruling, along with the grounds for the objection. Rule 5A.18. "Failure to make a timely defense has been held a waiver." Evans & Smith v. Commonwealth, 226 Va. 292, 298, 308 S.E.2d 126, 130 (1983); Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969). Appellant did not object to Mr. Camblos's presence until after appellant had been sentenced to three years in prison, at which time he filed his motion for reconsideration. Appellant's objections was untimely. The Court, therefore, will not consider this issue.

II. Appellant also argues that the judgment in this case is constitutionally infirm as a result of administrative proceedings the Commonwealth undertook against the

physician who testified against appellant in 1985. At appellant's 1985 preliminary hearing, the principal witness against appellant was Dr. DeLawter, who had written the altered prescription. Three years after appellant's conviction, Dr. DeLawter was placed on probation by the Virginia Board of Medicine for personal drug use and failure to maintain accurate records. Appellant now argues that the charges against the doctor make appellant's conviction unreliable. There is no evidence presented to support this charge.

"When an accused enters a voluntary and intelligent plea of guilty to an offense, he waives all defenses except those jurisdictional." Savino v. Commonwealth, 239 Va. 534, 538, 391 S.E.2d 276, 278, cert. denied, 498 U.S. 881 (1990). Accordingly, "there is nothing to appeal"; Id. at 539, 391 S.E.2d at 278 (quoting Peyton v. King, 210 Va. 194, 196-97, 169 S.E.2d 569, 571 (1969)); and the judgment will not be vacated.

III. Appellant asserts that the Commonwealth breached the 1993 plea agreement when it sought to revoke appellant's probation for the 1985 violation. Neither the plea agreement nor the circuit court's order signed on April 5, 1993 make any mention of incarceration. Instead the plea agreement recommends that the court impose a fine and probation. The court adopted the recommendation. While there was an implicit understanding that the Commonwealth would not seek incarceration with regards to the April, 1993 conviction, there was no such implication regarding his probationary status.

Appellant cites United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), and Santobello v. New York, 404 U.S. 257 (1971), to justify his belief that the Commonwealth has breached the plea agreement. These cases are not on

point. In Harvey there was an explicit statement in the plea agreement stating that the government would refrain from further prosecution of drug offenses in the Eastern District of Virginia. The Fourth Circuit interpreted the plea agreement to bar prosecution by the government of similar contemporaneous offenses in any district in the United States. Harvey, 791 F.2d at 303. Likewise, in Santobello the prosecution explicitly promised to make no recommendation as to sentence. The prosecution later broke this promise and sought the maximum penalty. In reversing the conviction, the Supreme Court state that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello, 404 U.S. at 262 (emphasis added). In the instant case, the Commonwealth is not seeking further prosecution of similar, contemporaneous offenses. Although the 1985 and 1993 charges may be similar, they are separate events and in no way related. Furthermore, the Commonwealth did not promise to refrain from seeking probation revocation for an offense for which appellant had already been convicted. The record is devoid of any promise regarding appellant's probation.

"It is beyond question that '[a] court which has ordered a suspension of sentence undoubtedly has the power to revoke it when the defendant ha failed to comply with the conditions of this suspension.'" Russnak v. Commonwealth, 10 Va. App. 317 321, 392 S.E.2d 491, 493 (1990) (quoting Griffin v. Cunningham, 205 Va. 349, 354, 136 S.E.2d 840, 844 (1964)). Appellant failed to comply with the conditions of probation when he was convicted for prescription fraud in 1993. Revocation of appellant's probation "will not be reversed unless there is a clear showing of abuse of discretion." Davis v. Commonwealth, 12 Va. App. 81, 86, 402 S.E.2d 684, 687 (1991). There

was no abuse of discretion in revoking appellant's probation, and the decision will not be disturbed.

IV. Appellant contends the trial court failed to articulate the reasons upon which it relied in revoking the appellant's probation, and therefore, the November 8, 1993 order should be vacated. "The probationer is entitled to...a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." Black v. Romano, 471 U.S. 606, 612 (1985) (citing and applying Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), to state court proceedings). This notwithstanding, "a transcribed oral finding can serve as a 'written statement' for due process purposes when the transcript and record compiled before the trial judge enables the reviewing court to determine the basis of the trial court's decision." United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992). See also United States v. Barth, 899 F.2d 199, 201-02 (2nd Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

In the instant case, a transcript of the probation violation is available in which appellant's counsel concedes that appellant's guilty plea in Richmond "may be a technical violation" of the terms of appellant's probation. He subsequently agrees with the judge's finding that a probation violation occurred when appellant was convicted of the felony charges in Richmond. Appellant was present at the hearing, was represented by counsel, and adequately informed of the reasons for his probation revocation. Accordingly, the November 8, 1993 probation revocation order will not be vacated.

V. Finally, the appellant argues that his reliance upon his former counsel's advice vitiates his Alford plea in Richmond; consequently, the probation revocation is constitutionally infirm. Appellant is attempting to assert and ineffective assistance of counsel claim against the

attorney who represented him in the Richmond proceedings. All the cases cited on appellant's behalf reflect that the proper forum for such a challenge is a habeas appeal. See Myers v. Stephenson, 781 F.2d 1036 (4th Cir. 1986); Manley v. United States, 588 F.2d 79 (4th Cir. 1978). Appellant's claim against his attorney for actions in a collateral proceeding may not be considered in this appeal of his probation revocation. See Morse v. Commonwealth, 6 Va. App. 466, 369 S.E.2d 863 (1988).

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*Retired Judges William H. Hodges and Carleton Penn took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,
Teste:

Richard R. James, Clerk
By: (s)_____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of September, 1995.

Dexter Drake Coffin, III,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 950952
Court of Appeals No. 2432-93-2

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal. Justice Koontz took no part in the consideration of this case.

A Copy,
Teste:

David B. Beach, Clerk

By: (s)_____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 24th day of October, 1995.

Dexter Drake Coffin, III,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 950952
Court of Appeals No. 2432-93-2

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of Dexter D. Coffin, III, in proper person, it is ordered that issuance of the mandate entered herein September 22, 1995 be and the same hereby is deferred, to and including the 21st day of December, 1995, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court

A Copy,
Teste:

(s)_____
Clerk